APPENDIX A

[Caption omitted]

Application for an Order Under Rule 25(2) Suspending the Order of Denial of Certiorari Pending Filing of a Petition for Rehearing

To the Honorable Byron R. White, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit:

The petitioners* hereby respectfully pray for an order pursuant to Rule 25(2) of the Rules of this Court, suspending this Court's order of Monday, October 9, 1967, denying certiorari to the United States Court of Appeals for the Tenth Circuit.

The grounds for this motion are that unless the order is suspended, the pertioners' bail will very likely be revoked before a petition for rehearing can be presented to this Court. The petition for rehearing will present substantial legal and factual material which has come to the attention of counsel for the petitioners since the filing of the petition for certiorari, and which counsel believes warrants reconsideration of the petition.

The facts giving rise to this application are as follows: The petition for certiorari was filed May 7, 1967, and denied on October 9, 1967. Question No. 2 in the petition dealt with the trial judge's refusal, during the course of a post-trial hearing, to permit inquiry into eavesdropping or wiretapping in Chicago during which petitioner Alderisio's voice was overheard. In his response to the petition, the Solicitor General argued only that the refusal to permit inquiry was proper in the post-trial procedural context. The reply did not mention the existence vel non of illegal electronic surveillance, though the record clearly warranted

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* Petitioner Kolod died in August, 1967, while the petition was pending. The issues tendered in this motion and in the petition for rehearing apply to petitioners Alderman and Alderisio.

the customary investigation by the Solicitor General and a statement concerning its existence. See Supplemental Memorandum for the United States, No. 504, October Term 1966, *Schipani* v. *United States*, p. 5. Thus, when certiorari was denied, petitioners' counsel immediately initiated conversations with the Department of Justice to secure a statement on the record concerning illegal surveillance involving Alderisio. These conversations are still going on, and the Acting Solicitor General has authorized petitioners' counsel to say that, upon his completion of certain inquiries and discussions within the Department of Justice, he will inform counsel, well within the time for filing a petition for rehearing, whether he will make a statement on the surveillance issue. This fact alone, counsel submits, justifies suspension of the order of denial so that, after the Acting Solicitor General has made whatever representation he cares to make, the matter can be examined anew by the whole Court. Examination by the entire Court has been conducted in the past, with varying results depending upon the circumstances. See *Black v. United States*, 385 U.S. 26 (1966); *O'Brien* v. *United States*, 386 U.S. 345 (1967); *Hoffa* v. *United States*, 387 U.S. 231 (1967); *Markis* v. *United States*, 387 U.S. 425 (1967).

In addition to the above, counsel learned for the first time in June and July 1967 of additional facts which perhaps explain the willingness of government counsel to inquire anew into electronic surveillance in this case. A hearing on a motion to suppress in *United States* v. *Nesline*, Cr. No. 535-65, D.D.C., in June 1965, uncovered a large-scale FBI effort to conceal from government counsel and the courts the existence and nature of electronic surveillance in federal criminal cases. The FBI revealed that Nesline had been "bugged" through a device in Miami. The information thus obtained was sent to the Washington Field Office of the FBI, labelled as having come from "MM 972-C*). The asterisk indicated to the Field Office that the report in question was the product of a "bug". The

Washington case agent then transmitted the information to the Department of Justice attorneys, identifying its source with a new symbol, "WFT-170", the type of designation normally used for confidential informants and other legal (and live) sources. One of the government attorneys in Nesline stated that he understood from the WFT designation that the information had been supplied by a live informant. Transcript of Proceedings before Judge Oliver Gasch, June 29-30, 1967; *United States* v. *Nesline*, Cr. No. 536-65, D.D.C., pp. 203-05, 260-62. In addition to thus masking the nature of its reports on Nesline, the FBI was affirmatively disingenuous with government attorneys who sought to learn the truth. Nesline's initial suppression motion had asked for all electronic recordings of his conversations. The prosecutor testified that the reason for his original denial that any existed was that the FBI case agent had so informed him. He had to reverse himself shortly before trial when the Miami device came to light. The FBI case agent testified that he had refrained from disclosing the Miami "bugging," because he had assumed the prosecutor was asking about "bugging" directed at Nesline, not that which, although nominally directed against others, picked up Nesline's conversations. *Id.* at 212-13, 304-05. The Solicitor General has of course conceded the necessity to investigate to determine whether illegal surveillance exists, Supplemental Memorandum for the United States, *Schipani* v. *United States*, No. 504, October Term 1966, p. 5, but the *Nesline* hearing makes clear that the need is greater than had previously been thought.*

* Other examples of concealment may be cited as well. In the case of *McGarry* v. *United States*, No. 6925, 1st Cir., argued and pending decision, the government revealed after the jury was in the box that the defendant had been picked up on a wiretap. Put to a hearing on the spot, the defense nonetheless discovered from Owen Burke Yung of the Internal Revenue Service that in the course of his Organized Crime Division duties he had conducted many wiretaps, and that he listened to wiretap tapes recorded by others, caused the tapes to be erased, then communicated the in-

The government's only justification for originally withholding the truth about the "bugging" in *Nesline* was that "the Schipani policy had not been adopted at that time." At the trial court's rejoinder that "policy is one thing; truthfulness is another," the prosecutor explained that before *Schipani*, "the policy simply was that the defendants had to make their showing under Nardone." Absent such a showing by the defendant, the government had "no policy [of] delving deeply into what may have gone on . . . ." Nesline transcript, *supra*, at 10-13, 18-19.

Counsel respectfully submits that the circumstances justify suspension of the order denying certiorari pending the Acting Solicitor General's answer and the filing of a petition for rehearing based upon it. The showing above gives far more reason to believe that a petition for rehearing would be granted than the statements of counsel in *Flynn* v. *United States*, 99 L. ed. 1298 (1955), in which Justice Frankfurter granted, under former Rule 25(2), the relief requested here. In that case, counsel for the petitioners, leaders of the Communist Party of the United States, stated only an intention to file a petition for rehearing "presenting grounds which were not raised in the petition for certiorari, but which are available to them, and which are of a substantial nature."

Justice Frankfurter said:

> "A petition for rehearing of a denial of a petition for a writ of certiorari is part of the appellate procedure authorized by the Rules of this Court, subject to the requirements of Rule 58. The right to such a

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formation to the appropriate OCD regional coordinator. On his worksheets, he logged this illegal activity as "engaged in OCD duties." Thus, every effort appears to have been made to conceal the source of illegally-obtained information, and to frustrate the discovery of the illegality by those whose liberty was placed in jeopardy as a result of it. Brief for Appellant, *McGarry* v. *United States*, No. 6925, 1st Cir., pp. 49-55.

consideration is not to be deemed an empty formality as though such petitions will as a matter of course be denied. This being so, the denial of a petition for certiorari should not be treated as a definitive determination in this Court, subject to all the consequences of such an interpretation. Accordingly, on an appropriate showing that a substantial matter, as required by Rule 58, is to be presented, appropriate opportunity should be given for doing so." 99 L. ed. at 1299.

This case presents another parallel with *Flynn*. Here, as there, there is no indication in the record or otherwise that petitioners have in any manner abused their enlargement upon bail. Indeed, since denial of the writ, petitioner Alderisio has been in almost constant touch with counsel. It should be noted, moreover, that just four years prior to Justice Frankfurter's order in *Flynn* (a Smith Act case), four Communist Party Smith Act defendants whose convictions were affirmed in *Dennis* v. *United States*, 341 U.S. 494 (1951), had jumped bail. Two of them were still at large at the time of Justice Frankfurter's order. See *United States* v. *Hall*, 101 F. Supp. 666 (S.D.N.Y. 1951), *aff'd*, 198 F.2d 726 (2d Cir. 1952), *cert. denied*, 345 U.S. 905 (1953); *United States* v. *Thompson*, 117 F. Supp. 685 (S.D.N.Y. 1953), *aff'd*, 214 F.2d 545 (2d Cir.), *cert. denied*, 348 U.S. 841 (1954); *United States* v. *Green* and *United States* v. *Winston*, 140 F. Supp. 117 (S.D.N.Y. 1956), *aff'd*, 231 F.2d 631 (2d Cir. 1957), *aff'd*, 356 U.S. 165 (1958). Thus, if anything, this case is *a fortiori Flynn*.

It appears, therefore, that relief under Rule 25(2) is warranted on the law and the facts, and it is therefore respectfully prayed that the order of denial be suspended either pending the filing of a petition for rehearing within the time set by Rule 58, or within the time and upon the conditions the Court or Circuit Justice may direct. *Flynn* v. *United States*, 99 L. ed. at 1298.

APPENDIX B

[Caption omitted]

Response to Application for an Order Under Rule 25(2) Suspending the Order of Denial of Certiorari Pending Filing of a Petition for Rehearing

In their petition for a writ of certiorari, petitioners presented the following question (among others):

> 2. Whether, in a case where the government has admitted illegal FBI eavesdropping in premises belonging to one of the defendants and defense counsel has represented in open court the existence of newly discovered evidence of additional illegal eavesdropping in premises belonging to another of the defendants, the government is obligated either to deny the alleged additional eavesdropping or, if not denying it, to disclose its details to the defense.

The government's argument, made in response to this question, was that the trial court, acting pursuant to a limited remand by the court of appeals, had properly confined its hearings to issues within the scope of the remand and that petitioners' allegations of eavesdropping of petitioner Alderisio in Chicago were outside the scope of the proceding. See Brief in Opposition, pp. 11-12. This does not mean that petitioners could not have sought other appropriate relief from the district court or that they are now precluded from doing so.

Following the Court's denial of the writ on October 9, 1967, petitioners' counsel called the undersigned and requested him to look into petitioners' allegations relating to eavesdropping of petitioner Alderisio in Chicago. I advised counsel that I presumed that the government had already looked into the matter fully pursuant to its program of review as described in the government's supplemental memorandum to this Court in the case of *Schipani* v. *United States*, October Term, 1966, No. 504. I stated that I would

undertake to confirm this, to secure a re-examination of information possessed by this Department, and to advise counsel if we concluded that the government was obligated to make any disclosure to the courts pursuant to the policy which it has followed. That policy, as has been stated on prior occasions, is that the Department will undertake to make disclosure to the courts if it finds (1) that there has been an electronic surveillance which is or may be unlawful, and (2) that the government has thereby obtained any information which is arguably relevant to the litigation involved.

A check reveals that petitioner Alderisio was covered by the Department's review procedures and that it was previously determined by appropriate officials of this Department that his case did not come within the Department's policy of disclosure. Re-examination of the matter has not altered this conclusion.

In light of the above, it appears to us that petitioners' contemplated petition for rehearing will present no issue not previously argued in the petition for a writ of certiorari and that there is no change of circumstance which calls for a different disposition of the case. For these reasons, we oppose the application.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

OCTOBER 1967.

APPENDIX C

[Caption omitted]

Reply Memorandum Re Application for an Order Suspending the Order of Denial of Certiorari

The Department of Justice, through the Acting Solicitor General, has filed its response to the petitioner's application. By its response, the disquieting elements of the government's *Schipani* memorandum are shown to carry all the danger their words portended: The Department of Justice has arrogated to itself the power to decide the crucial issue in every surveillance case—the extent of the taint—and has thereby usurped a power which Article Three commits to this Court. By insisting it has no duty to disclose except when it finds the surveillance to have been "arguably relevant to the litigation involved," the Department apparently asks this Court to assume, *arguendo*, that there is illegal surveillance in this and, indeed, in every case. One must make this assumption under the Department's two-step test, for the Acting Solicitor General insists on stating his grounds for nondisclosure in the form of two independent alternatives. The second of these alternatives, the "relevancy" determination, is presumably equivalent to the "materiality" determination mentioned in the *Schipani* memorandum. The Department has apparently forgotten that Rule 41(e), Federal Rules of Criminal Procedure, commits to the judiciary the function of ordering illegally seized property returned and commanding evidence illegally obtained suppressed.

The Department asks more, however. It asks leave to conceal the illegal conduct unless it, the attorney for the lawbreaker, sees fit to disclose it. Of course, the Department has no incentive to reveal the illegal activity. Moreover, the sort of investigation which its makes can *never* be as complete and careful as one conducted under proper safeguards in an adversary proceeding. To paraphrase this Court in *Dennis* v. *United States*, 384 U.S. 855, 874-75

(1966), in our adversary system, it is enough for prosecutors to prosecute. "The determination of what may be useful to the defense can properly be made only by an advocate." *Ibid.*

We do not here challenge the veracity or integrity of government counsel, but only underscore that no man is fit to judge his own cause, *In re Murchison,* 349 U.S. 133 (1955), let alone argue his opponent's.

Furthermore, the Department's policy is squarely at odds with the mandate of *United States* v. *Wade,* 388 U.S. 218, 240 (1967), that the government dispel the taint of illegal evidence-gathering by "clear and convincing proof."

Upon the grounds above stated, and upon the grounds set forth in the original application, petitioners respectfully pray for an order suspending the order denying certiorari. The initial application was not lightly filed, but only after counsel had been reliably informed that there was electronic surveillance of petitioner Alderisio at his place of business in Chicago. Petitioner believes that a petition for rehearing, in the present posture of the case, would present substantial issues not tendered by the petition for certiorari.

APPENDIX D

[Caption omitted]

Order

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the effect of the order denying certiorari in the above-entitled case be, and the same is hereby, suspended pending the timely filing and disposition of a petition for rehearing.

s/ BYRON R. WHITE
Associate Justice of the
Supreme Court of the United States.

Dated this 17th day of
October, 1967.

